

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BAYVIEW CHIROPRACTIC, INC.

and

Case No. 7-CA-47969

PATRICIA LYNN MOORE, an Individual

Joseph Canfield, Esq., for the General Counsel.

David Kipley, Esq., for the Respondent.

Lee Hornburger, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. A trial in this matter was held on May 12, 2005, in Traverse City, Michigan, following the filing of a charge by Patricia Lynn Moore on October 8, 2004,¹ and amended on November 22, and issuance of a complaint on November 24, by the Regional Director for Region 7 of the National Labor Relations Board (the Board) alleging that Bayview Chiropractic, Inc. (the Respondent) had violated Section 8(a)(1) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by maintaining certain unlawful rules in its employee manual prohibiting employees from discussing wages, or other terms and conditions of employment, and by discharging Moore for violating said rules. By answer dated December 4, the Respondent denied engaging in any unlawful conduct.

All parties were afforded a full and fair opportunity to call and examine witnesses, to present oral and written evidence, to argue orally on the record, and to file post-trial briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

Jurisdiction

The Respondent is a Michigan corporation with an office and place of business in Acme, Michigan, where it is engaged in the business of providing chiropractic medical services. During the 2003 calendar year, a representative period, the Respondent derived gross revenues in excess of \$250,000, and, during the same period, received at its Acme facility in excess of \$5000 from insurance companies, which are themselves directly involved in interstate commerce, for services provided to individuals insured by said insurance companies. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6),

¹ All dates are in 2004, unless otherwise indicated.

and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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Factual Background

The Respondent is operated by Dr. Charles Lange, its president and sole shareholder, and has been in operation for approximately five years. Charlotte Beadle serves as its office manager, and Kathleen Mitchell has, since September 2003, served as its front desk receptionist. Mitchell's duties included taking and making appointments for patients, directing patients to their appointments, and billing clients for services rendered.

Moore initially began working for the Respondent as a subcontracted certified massage therapist. In September 2003, she became an employee of the Respondent. Her pay consisted of 70% of the rate charged by the Respondent for each massage provided to clients. Moore testified that beginning in 2002, and continuing into 2004, she began having problems with her pay. The problems, she claims, involved her not receiving payment or receiving only partial payment for massage services rendered. In September 2003, Moore began discussing her problem with Mitchell, who assured Moore she would look into the matter and, after some investigation, told Moore that there were massages for which she had yet not been paid.

In early July, the Respondent put into effect an employee manual containing, inter alia, the following two employee rules (see GCX-2):

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DISCUSSION OF SALARIES

Salaries are considered strictly confidential in this office. It is the firm policy of this clinic that no employee shall discuss with any other employee of the clinic, his/her salary or the salary of anyone else in the clinic. To do so is grounds for immediate termination without prior warning. The employee may set up a formal time, with the Doctor or office manager only, for questions or discussion of salary.

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GRIEVANCES

Sometimes in the relationship of employee to employee, or employee to employer, dissatisfaction develops. It is the employee's responsibility to discuss problems or grievances with the office manager or Doctor immediately. Every reasonable effort will be made to work out a satisfactory settlement. Complaining about or undermining procedure, policies, decisions, or staff personalities with other staff members distracts other staff members from their work, radiates negative energy, to other staff members, and breaks down the morale of the entire staff. Therefore, such actions will not be tolerated.

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Lange testified that the idea for the employee manual was suggested to him by a management group known as Capacity Management, which provides advice to chiropractic business entities. He explained that he decided to adopt and put into effect the employee manual based on Capacity Management's advice that the Respondent needed the employee manual to protect itself, and on its representation that the provisions in the manual were lawful nationwide.

Moore received a copy of the employee manual from Beadle in early July with instructions to read and sign it. She testified that while she found certain provisions in the manual to be objectionable, she nevertheless signed and returned it to Beadle. Mitchell

Moore and Mitchell both testified that sometime in July, after receiving the employee manual, they again had a discussion about Moore's continuing pay problems in Beadle's presence. At one point, Mitchell commented to Beadle that Moore's problem with her pay could easily be resolved. Beadle, however, turned and walked into Dr. Lange's office and shut the door without saying a word. Mitchell claims that later that same day, Lange called her into his office and asked if Moore was still complaining. Mitchell replied that she was, and Lange asked what Moore was complaining about. Mitchell responded that Moore was complaining about not being paid for her massages, to which Lange remarked, "Oh, those damn massages," and added, "Do you know that's against Company policy?" Mitchell did not respond but simply turned and walked out of the office. (Tr. 47). Mitchell claims that Moore continued complaining to her following her meeting with Lange about her pay shortages.

On September 18, Lange called Moore into his office and asked why she told Mitchell she was going to see a lawyer. Moore replied that she did so because Mitchell was her friend. Moore claims that Lange then read from the "Discussion of Salaries" and "Grievances" rules in the employee manual. After reading the provisions to her, Lange handed her an envelope containing a termination letter, informed her that her services were no longer required, and instructed her to empty out her room and turn in her key to Beadle. Moore took the envelope and left. When she got home, she opened the envelope and read the discharge letter. In the letter signed by Lange, the latter advised that it had come to his attention that Moore had "violated a *firm* office policy by discussing your salary with another employee (other than the Doctor or the Office Manager). The policy, Lange further notes in the letter, states that "salaries are considered strictly confidential in this office and that discussing them with another is grounds for immediate termination *without prior warning*."

Lange testified at the hearing. He did not, however, dispute Moore's version of the September 18, meeting between the two, including Moore's assertion that he read the "Grievances" provision, as well as the rule prohibiting discussion of salaries, aloud to her before announcing that she was being discharged for violating said policies. Moore's undisputed account is therefore credited. Either before or after he fired Moore, he could not recall precisely when, Lange learned that the prohibition on employee discussion of salaries was unlawful under Michigan state law. He contends that after discussing the matter with his attorney, the rule against discussion of salaries was discontinued. There is no evidence to suggest, nor does the Respondent contend, that the decision to discontinue use of the "Discussion of Salaries" rule was ever conveyed, orally or in writing, to employees. There is likewise no indication that adherence to the "Grievances" rule was also discontinued.

Beadle similarly testified that the Respondent learned through its attorney, after Moore was discharged, that the policy against employees discussing wages with each other was a misdemeanor under Michigan state law, and that Lange was advised to rehire Moore. It appears that Moore did, in fact, receive an offer of reinstatement, returned to work for a brief period of time, and then left her employment.

Discussion and analysis

The evidence makes patently clear, and no claim is being made to the contrary, that

Moore did indeed discuss her salary problems with Mitchell on numerous occasions in contravention of Respondent's rules. However, the General Counsel, on brief, contends that the "Discussion of Salaries" and "Grievances" rules in the Respondent's employee manual are unlawful, and that the discharge of Moore for violating said rules violated Section 8(a)(1) of the Act.² For its part, the Respondent, on brief, does not dispute the allegation that the rules are invalid, but does contend that Moore was an "at will" employee who was lawfully discharged for exhibiting "negative energy" at the workplace and whose services were no longer needed.

The test for determining the validity of employer work rules was set forth by the Board in *Lafayette Park Hotel*, 326 NLRB 824 (1998), and more recently in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004); *Guardsmark, LLC*, 344 NLRB No. 97 (June 7, 1995); and *Claremont Resort and Spa*, 344 NLRB No. 105 (June 16, 2005). In *Lafayette Park*, supra at 825, the Board held that "in determining whether the mere maintenance of rules, like those at issue here, violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Said inquiry begins with determining whether the rule explicitly restricts activities protected by Section 7. However, the Board has made clear that in making this determination, it will give the challenged rule a reasonable interpretation, and will refrain from reading particular phrases in isolation or presuming improper interference with employee rights. *Lutheran Heritage Village-Livonia*, supra, *Guardsmark*, supra. If the rule explicitly restricts Section 7 activity, it will be found to be unlawful. If, however, the rule does not on its face restrict activity protected by Section 7, the finding of a violation will be dependent on a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.*, also, *Claremont Resort*, supra.

Applying the above principles to the case at hand, it is patently clear that both the "Discussion of Salaries" and "Grievances" rules in the employee manual are unlawful. The "Discussion of Salaries" rule, as noted, prohibits employees from discussing salaries with each other. It is well-settled, however, that the right of employees to discuss their salaries with each other is an inherently concerted activity protected by Section 7 of the Act. A rule prohibiting such discussions is, therefore, unlawful, and the imposition of discipline on an employee for engaging in such protected activity in contravention of said rule violates Section 8(a)(1) of the Act. *Automatic Screw Products, Co.*, 306 NLRB 1072 (1992); see, also, *Valley Slurry Seal*

² The complaint, it should be noted, does not allege the "Grievances" provision in the employee manual to be unlawful. Rather, the complaint, at paragraph 6(b), alleges as unlawful part of a "Confidentiality" rule also found in the employee manual. (See GCX-1[e], GCX-2) On brief, however, the General Counsel, relying on undisputed testimonial evidence from Moore that she was discharged for violating the "Grievances" and "Discussion of Salaries" provisions in the manual, contends that the "Grievances" rule is unlawful, but makes no mention of, or reference to, the language in the "Confidentiality" rule as unlawful. The absence of any mention by the General Counsel in his brief to the allegation regarding the "Confidentiality" rule, and his argument therein that the "Grievances" rule should instead be found unlawful, convinces me that the General Counsel has abandoned the former complaint allegation for the latter. As the record makes clear that Moore was discharged, in part, for violating the "Grievances" rule, I find that the issue of whether the "Grievances" rule is lawful was litigated at the hearing and is, therefore, properly before me for consideration. Accordingly, I make no finding on the validity of the language in the "Confidentiality" rule alleged in complaint paragraph 6(b) to be unlawful.

Company, 343 NLRB No. 34, slip op. at 13 (2004); *Northwest Graphics, Inc.*, 342 NLRB No. 127, slip op. at 9 (2004); *Convenience Food Systems, Inc.*, 341 NLRB No. 44, slip op. at 7 (2004); *Medione of Greater Florida, Inc.*, 340 NLRB No. 39 slip. op. p. 3 (2003); *Amber Foods, Inc.*, 338 NLRB 712, 729 (2002); *Kaminski Electric & Service Co., Inc.*, 332 NLRB 452, 461 (2000).

As to the “Grievances” rule, that provision, as noted, prohibits employees from “complaining about or undermining procedure, policies, decisions, or staff personalities with other staff members.” While the rule, on its face, does not explicitly prohibit employees from engaging in Section 7 protected activity, employees reading the rule could reasonably interpret it as prohibiting them from complaining about, or discussing among themselves, Company policies, practices and/or procedures, management decisions, or the conduct of staff members which they believe may be adversely affecting their terms and conditions of employment. Indeed, it was this rule, in conjunction with the “Discussion of Salaries” rule, which Lange cited to Moore, and on which he relied, to terminate Moore for complaining to others about the Respondent’s failure to fully compensate her for her massage work.³ Thus, not only could the “Grievances” rule be reasonably construed by employees as restricting Section 7 activity, it was, in Moore’s case, in fact used for that very purpose, e.g. to punish her for complaining about her working conditions.

Accordingly, I find that both the “Discussion of Salaries” and “Grievances” rules are unlawful under *Lafayette Park Hotel*, and its progeny, and that the discharge of Moore for contravening said rules violated Section 8(a)(1) of the Act, as alleged. That Moore may have been an “at-will” employee, as the Respondent asserts on brief, does not warrant a different result, for while, under some circumstances, an employer may discharge an employee for a good reason, a bad reason, or no reason at all, an employer may not discharge employees for engaging in concerted activities protected by Sections 7 and 8(a)(1) of the Act, see, *Centurion*, 304 NLRB 1104, 1105 (1991), as was the case here with Moore.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining in its employee manual an unlawful “Discussion of Salaries” rule prohibiting employees from discussing salaries with each other, and an unlawful “Grievances” rule prohibiting employees from complaining about or undermining procedure, policies, decisions, or staff personalities with other staff members,” and by discharging employee Patricia Moore for violating these rules, the Respondent violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to

³ The Respondent’s assertion, on brief, that Moore was discharged because “she exhibited ‘negative energy’ around the workplace,” also makes clear that the “Grievances” rule was used to support her discharge for discussing her salary with others, for the phrase “negative energy” comes straight out of the “Grievances” rule and refers to what the Respondent believed was the effect employee complaints or discussions would purportedly have on other employees.

effectuate the policies of the Act.

The Respondent shall be ordered to cease maintaining and giving effect to the “Discussion of Salaries” and “Grievances” rules in its employee manual. To remedy its unlawful discharge of Patricia Moore, the Respondent shall be required to, within 14 days from the date of the Order, offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. The Respondent shall also be ordered to make Patricia Moore whole for any losses she may have suffered resulting from her September 18, unlawful discharge, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, the Respondent shall be required to, within 14 days from the date of this Order, remove from its files any reference to Moore’s unlawful discharge, and, within 3 days thereafter, to notify her, in writing, that this has been done and that the discharge will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Bayview Chiropractic, Inc., Acme, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist:

(a) From promulgating, maintaining, and giving effect to the “Salaries” and “Grievances” rules in its employee manual.

(b) Terminating or otherwise discriminating against employee Patricia Moore, or any other employee, for exercising her Section 7 right to discuss her wages with other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the “Discussion of Salaries” rule and “Grievances” rule from its employee manual.

(b) Within 14 days from the date of the Order, offer Patricia Moore full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Patricia Moore whole for any loss of earnings and other benefits she may have

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

5 (d) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of Patricia Moore, and within 3 days thereafter notify her, in writing, that this has been done and that her discharge will not be used against her in any way.

10 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (f) Within 14 days after service by the Region, post at its facility in Acme, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are
20 customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent
25 at any time since July 1, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

30 Dated, Washington, D.C.

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George Alemán
Administrative Law Judge

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⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

**APPENDIX
NOTICE TO EMPLOYEES**

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, maintain, or enforce rules in our employee manual prohibiting employees from discussing their wages or other terms and conditions of employment among themselves.

WE WILL NOT discharge or otherwise discriminate against Patricia Moore or any other employee for exercising their Section 7 right to discuss wages or other terms and conditions of employment with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the "Discussion of Salaries" and "Grievances" rules from our employee manual.

WE WILL, within 14 days from the date of the Board's Order, offer Patricia Moore full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to the seniority or any other rights or privileges previously enjoyed.

WE WILL make Patricia Moore whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Patricia Moore's unlawful discharge, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done, and that her discharge will not be used against her in any way.

BAYVIEW CHIROPRACTIC, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569

313-226-3244, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3723.